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Joint Tenancy in Colorado

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EDITOR'S NOTE: This, in substance, is the paper presented by Mr. Popham before the session on Probate, Trust and Real Estate law of the Colorado Bar Association at its convention in Colorado Springs, October 13-15, 1949.

An estate in joint tenancy is one held by two or more persons jointly with equal rights to share in its enjoyment during their lives, and having, as its distinguishing feature, the right of survivorship by virtue of which the entire estate upon the death of any of the tenants goes to the survivor, and so on to the last survivor, who take an estate of inheritance.

To constitute joint tenancy, there must be four unities: (a) unity of interest, (b) unity of title, (c) unity of time, and (d) unity of possession. If anyone of these elements is lacking, the estate will not be in joint tenancy. A unity of interest requires that the shares of the joint tenants, whatever be their number, shall be equal and that the duration of their estate shall be the same. A joint tenancy may exist in personal property as well as real property.[1]

All natural persons may be seized or possessed of an estate in joint tenancy. Since the relationships do not rest on contract, it is clear that disability of a person is no impediment to the formation of a joint tenancy. A natural person cannot be a joint tenant with a corporation, nor can two or more corporations hold as joint tenants. A husband and wife may also be joint tenants.[2]

Joint tenancies may be in fee, for life, for years, or in remainder. When it is desired to hold stocks and securities in joint tenancy in the names of two or more persons, the following language should appear after their names: "As joint tenants and not as tenants in common" or "As joint tenants with right of survivorship and not as tenants in common."[3] The same language should be used where a joint tenancy of securities or stock is created in a will.

Mortgages

A joint tenant may mortgage his interest and his interest may be levied upon and sold in satisfaction of debts. In *Wilkins v. Young*, 41 N. E. 68, 69, 70 (Ind.), it is said: "Any interest in real estate which a person may sell and convey he may also mortgage. Jones, Mortg. Sec. 136. We are

[1] Eisenhardt v. Lowell, 105 Colo. 417, 420. 3 C.S.A. 92-17 *et seq.*

[2] Wilken v. Young, 41 N. E. 68, 69 (Ind.).

[3] 3 C.S.A. 92-17.

therefore of the opinion that a joint tenant may mortgage his interest in the joint estate in like manner as though he were a tenant in common, and to the extent of the mortgage lien the right of the survivor will be destroyed or suspended, and the equity of redemption, at the death of the tenant, will be all that will fall to the surviving companion."

The question arises, does the giving of a mortgage or a deed of trust to secure an indebtedness by one joint tenant on his interest in the property affect a severance of the joint tenancy? It seems that in those states where a mortgage or deed of trust operates to convey the title in a similar manner as a deed, such instrument terminates the joint tenancy without further action.[4]

Mortgages and trust deeds in Colorado are liens and not conveyances as stated in 2 C.S.A. 40-118 as follows:

> "Mortgages, trust deeds or other instruments intended to secure the payment of an obligation affecting title to or an interest in real property, shall not be deemed a conveyance, regardless of its terms, so as to enable the owner of the obligation secured to recover possession of real property without foreclosure and sale, but the same shall be deemed a lien."

Tolland Company v. First State Bank, 95 Colo. 321, follows the statute in holding that mortgages and deeds of trust are liens and not conveyances. There is no decision in Colorado passing upon the question as to whether a mortgage or deed of trust would terminate a joint tenancy. In view of the fact that by statute and by decision of our Supreme Court mortgages and deeds of trust are not classed as conveyances but as liens, it would seem that they would not affect a severance of a joint tenancy until after foreclosure sale.

Judgment and Execution Liens

In *Ziegler v. Bonnell*, 126 P. (2d) 118 (Calif.), we find the rule as to judgment liens stated on page 120 of the opinion:

> "* * * When a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency, as respondent did in this case, he assumes the risk of losing his lien." [4a]

In *Van Antwerp v. Horan*, 161 A.L.R. 1133, 61 N.E. (2d) 358 (Ill.), it is decided that mere execution levy upon real estate on the interest of one

[4] Hardin v. Wolf, 148 N. E. 868, 872 (Ill.) and, Tindall v. Yeats, 68 N. E. 2d 903, 907 (Ill.)

[4a] People's Trust & Savings Bank v. Haas, 160 N. E. 85 (Ill.), and Musa v. Segelke & Kohlhaus Co., 111 A.L.R. 168 (Wis.), support the above rule. The latter case has an annotation on the question.

joint tenant which does not transfer possession to the sheriff does not terminate the joint tenancy.[4b]

Partition

Partition could not be enforced under common law, but generally under state statutes a joint tenant may enforce partition. Prior to this year, our partition statute was 4 C.S.A., Chap. 122. Section 1 of this act provided that "When any lands, tenements or hereditaments shall be held in *joint tenancy,* tenancy in common or co-parcenary" it shall be lawful for one or more persons interested to bring an action for partition.

The whole of Chapter 122 was repealed by Chapter 193, 1949 Session Laws, page 544. Section 1 of the latter act reads as follows: "Actions for the division and partition of real or personal property or interest therein may be maintained by any person having an interest in such property." Section 2 reads: "All persons having any interest, direct, beneficial, contingent, or otherwise, in such property shall be made parties." It would seem that this language is sufficiently broad to include joint tenants.

Bank Accounts and Wills

Joint tenancy in bank accounts may be created.[5] Section 45 of Chapter 18, 35 C.S.A. covers this question in Colorado. It provides that when a bank deposit in any bank or trust company in this state is made in the names of two or more persons payable to them, or to any of them, such deposit, or any part thereof, or any interest or dividend thereon may be paid to any one of said persons, whether the others be living or not, and such deposit shall be deemed to be owned by said persons in joint tenancy with the right of survivorship.

Where a devise or bequest to two or more persons by name is in such form as to create a joint tenancy and one of them dies before the testator, the whole interest vests in the survivors. Therefore a joint tenant cannot devise or bequeath his interest since a will does not take effect until after the testator's death, at which instant the claim of the surviving tenant arises and goes into effect. Creditors have no recourse against the interest of a joint tenant who dies.[6]

American Policy Opposed to Joint Tenancy

As a general rule under the common law in the feudal period a conveyance to two or more persons was construed as a joint tenancy, but that rule later came into disfavor both in England and in America. The policy of the American law is opposed to survivorship and in accordance with this

[4b] See also Thornburg v. Wiggins, 34 N. E. 999, 1002 (Ind.), Midgley v. Walker, 60 N. W. 296, (Mich.), and annotations at 161 A.L.R. 1139.

[5] First National Bank of Aurora v. Mulich, 83 Colo. 518.

[6] 3 C.S.A. 92-18 to 23.

policy legislation abrogating the common law rule and modifying or abolishing the doctrine of survivorship has been enacted in most of the states. Such statutes in general provide in effect that all grants and devises of land made to two or more persons shall be construed to create estates in common and not in joint tenancy unless expressly declared to be in joint tenancy. Notable exceptions to these statutes are conveyances to trustees and executors.[7]

Colorado Joint Tenancy Law

In 1861, the Colorado legislature enacted a statute which read as follows: "No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise or conveyance whatsoever hereafter made other than to executors and trustees, unless the premises therein mentioned shall be thereby expressly declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors or trustees (unless otherwise expressly declared as aforesaid) shall be deemed to be tenancy in common." (2 C.S.A., Chap. 40, Sec. 4.)

This statute remained unchanged until 1939, when it was amended to clarify who might be grantors and grantees in a deed creating a joint tenancy. The statute, as amended, reads as follows: "No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise or conveyance whatsoever hereafter made other than to executors and trustees, unless the premises therein mentioned be thereby expressly declared to pass, not in tenancy in common, but in joint tenancy, provided, always, that such expressed declaration as aforesaid shall be deemed effective to create an estate in joint tenancy whether in a grant, devise or conveyance hereafter made from one person to others, or from one person to himself and another or others, or from tenants in common to themselves or to themselves and another or others, or from joint tenants to themselves and another or others. Nothing in this section shall be deemed to exempt any transfer from the operation of chapter 85 of the 1935 Colorado Statutes Annotated or chapter 75A of the supplement thereto." (1939 Session Laws, Ch. 40, p. 285.)

Must Exact Statutory Language Be Used?

The question naturally arises whether or not an instrument intended to create a joint tenancy must contain the exact language contained in this statute, namely: "Not in tenancy in common, but in joint tenancy." Title examiners frequently are faced with deeds that apparently attempt to create a joint tenancy, but do not use the exact language of the statute, and they are compelled to make a decision as to whether the instrument is sufficient for joint tenancy purposes. I have come to the conclusion that it is not necessary to use the exact statutory language in order to create an estate in joint tenancy if it appears from the instrument that it was the intent of the grantor to create such an estate.[8]

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7 Estate of Kwatkowski, 94 Colo. 222, 224.

8 33 C. J. p. 901, 905.

In *Sturkis v. Sturkis*, 146 N. E. 530 (Ill.) one Carl Edward Wagoner and Catharina Wagoner, his wife, conveyed to Rudolph Perlick and Henrietta Perlick, his wife, "as joint tenants and not as tenants in common" certain real estate in Chicago. The granting and *habendum* clauses in the deed did not contain the language above quoted but referred to second parties, their heirs and assigns. The conveyance was by warranty deed. It was claimed by appellants that the deed conveyed the premises to the grantees as tenants in common and not in joint tenancy while the appellees claimed that the deed created a joint tenancy in the grantees. It was held by the Supreme Court that the deed conveyed an estate in joint tenancy.

While the statute involved in this case is not set forth in the opinion, it was as follows: "No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise or conveyance whatsoever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common but in joint tenancy; and every such estate, other than to executors or trustees (unless otherwise expressly declared as aforesaid) shall be deemed to be in tenancy in common." This is almost the exact language of our statute.[9]

Superfluous Language in Joint Tenancy Deeds

The ordinary form of joint tenancy deed, which seems to be in common use in Colorado, adds language that is not contained in the statute. The conveyance in the granting clause generally runs to parties of the second part not in tenancy in common but in joint tenancy "the survivor of them, their assigns and the heirs and assigns of such survivor forever." The *habendum* clause is to said parties of the second part, "the survivor of them, their assigns and the heirs and assigns of such survivor forever." The survivorship language does not appear in our statute. The case of *Jones v. Snyder*, 188 N. W. 505, (Mich.) held that in a deed to four grantees "as joint tenants, and to their heirs and assigns, and to the survivors or survivor of them, and to the heirs and assigns of the survivors or survivor of them" created a joint tenancy for life in the grantees with a contingent remainder in fee simple to the survivor rather than creating a fee title in the joint tenants. Under such a situation none of the joint tenants would be able to break the joint tenancy by conveyance of their interest.

This case was criticized in *Greiger v. Pye*, 297 N. W. 173, 175 (Minn.), where it was said that such holding does not seem in accord with the decisions in other jurisdictions, as would be shown by an examination of the annotations in 129 A.L.R. 813, *et seq.*

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[9] See also Coudert v. Earl, 18 A. 220 (N.J.); Murray v. Kator, 190 N. W. 667 (Mich.); and Taylor v. Lowencamp, 145 A. 329 (N.J.).

Estate in Entirety Distinguished

It is well at this point to distinguish between an estate in joint tenancy and one in entirety. In *Sanderson v. Everson*, 141 N. W. 1025 (Nebr.), an estate by the entirety is defined as follows: "* * * The rule of entireties does not depend upon and is not created by contract. It is a fiction of the common law, having its origin in the feudal system, that where land was conveyed to the husband and wife jointly the title by entireties was created in them by act of law, and neither could dispose of the property without the consent of the other; each owned the *entire* title."

Estates in entirety do not exist in Colorado. In *Wyman v. Johnston*, 62 Colo. 461, it was held that our statute, 4 C.S.A. 108-1, concerning married women's property, is in conflict with the common law relating to estates by entireties and that the statute has abolished such an estate in Colorado.

Severance and Termination

The courts are virtually unanimous in agreeing that a joint tenant may, at his pleasure, dispose of his share and that such conveyance will result in a severance or termination of the joint tenancy.[10]

Occasionally a title examiner is called upon to pass on a deed from a joint tenant which conveys a specified undivided interest; for instance, an undivided one-half interest, and the question arises, Is such a description sufficient?

Patton on *Titles*, Section 146, Note 638, page 79, 1946 Cumulative Pocket Part, states that the courts "are practically unanimous that a conveyance by a joint tenant which would be effective if he had held the interest in severalty will be effective to break the joint tenancy and to give to the grantee a fractional interest in proportion to the number of owners who held as joint tenants." He refers to Section 249, page 794 of the original text where it is said: "But he can convey a fractional undivided interest in the premises proportionate to the number of the joint tenants." In the cases cited in the text, I have been unable to find one where the conveyance was of a specified undivided interest, such as a one-half interest. In *Wilkin v. Young*, 41 N. E. 68 (Ind.), it is said: "It is settled in law that a joint tenant may alienate or convey to a stranger his part or interest in the realty, and thereby defeat the right of the survivor. * * * In the ancient language of the law, joint tenants were said to hold *per my et per tout*, or, in plain words, 'by the moiety or half and by all'; the true interpretation of this phrase being that these tenants were seized of the entire realty for the purpose of tenure and survivorship, while for the purpose of immediate alienation each had only a particular part or interest. * * *"

If one of two joint tenants conveys his interest to a third person, in general language and not by describing it as a specified undivided interest,

[10] 14 Am. Jur., Co-Tenancy, p. 79.

the grantee becomes the owner of an undivided one-half interest and a tenant in common with the other joint tenant. It would, therefore seem that a deed of an undivided one-half interest should be sufficient. I have found the following cases that support this theory:

1. *Kozacik v. Kozacik*, 26 So. 2d 659 (Fla., 1946), holding that a "Written contract by which joint tenant agreed to sell his undivided one-half interest in realty to son, though not executed in presence of two subscribing witnesses as required by statute for conveyance of realty, was sufficient to terminate joint tenancy and destroy cotenant's right of survivorship."

2. *In re Cotter's Will*, 287 N.Y.S. 670. In this case one joint tenant deeded to his associate joint tenant "all my undivided one-half right, title and interest in and to" the premises. It was held that this created a severance of the joint tenancy by the conveyance of an entire interest.[11]

Tax Problems of Paramount Importance

In considering the question of placing property in joint tenancy, the taxing laws should always be borne in mind, viz.: Federal gift, estate and income taxes, and the Colorado gift, inheritance and income taxes. As to Federal gift taxes, each donor has a $30,000.00 exemption which may be used in whatever manner he sees fit.[12] If the gift in any one year does not exceed $3,000.00, no return is required.[13] If over $3,000.00, the donor must file a return and the donee must file an information return. On gifts made since April 2, 1948, to a spouse, a marital deduction is allowed to equal one-half of the value of the joint tenancy interest transferred to the spouse.[14]

For example, where H purchases house with own funds for $20,000.00 and has title conveyed to H and W as joint tenants, H must file gift tax return and W must file donee's information return. Computation of tax (assuming no prior taxable gifts at any time):

Value of gift to W (½ of purchase price)	$10,000.00
Less: marital deduction (½ of gift)	5,000.00
	$ 5,000.00
Less: $3,000.00 annual exclusion	3,000.00
Net gift tax	$ 2,000.00

A portion of H's $30,000.00 specific exemption may then be applied to cancel the $2,000.00 so no tax would be due.

The Colorado law allows a specific gift exemption of $20,000.00 on gifts to a spouse, child or lineal descendent of donor born in lawful wedlock.

[11] See, also, Green v. Skinner, 197 P. 60 (Calif.), and In re Weissbach's Estate, 183, N.Y.S. 771, 774.
[12] I.R.C., Sec. 1004 (a) (1).
[13] I.R.C.. Sec. 1006 (a)—Reg. 108, Sec. 86.23.
[14] I.R.C., Sec. 1004 (a) (3).

If gifts in any one year do not exceed $2500.00, no return need be made. If over $2500.00, donor must file return and donee an information return. Colorado has no marital deduction as the Federal statute has.[15]

Under the Federal estate tax law, the entire value of the property owned jointly is included in the estate of the joint tenant dying first, except such part thereof as originally belonged to the survivor or was never received from deceased for less than an adequate consideration in money or money's worth.[16] If more than one contributed to the purchase, records should be kept to show the contributions of each.

The Colorado inheritance tax law provides that on the death of a joint tenant only one-half of the value at date of death is included in his estate for inheritance tax purposes, regardless of who contributed to the purchase price.[17] A gratuitous transfer from a person to himself and another in joint tenancy within two years prior to donor's death is presumed to have been made in contemplation of death, to the extent of the full value of the property passing to the survivor.

If one takes property by will or inheritance, the basis for figuring Federal income taxes is the fair market value at time of death.[18] Thus, if one takes as a surviving joint tenant, the basis for computing gain or loss on a subsequent sale by the survivor is the adjusted cost of the property (which takes into consideration depreciation, capital additions, etc.)[19] The same rules apply in Colorado.[20]

Conclusions As To Tax Problems

1. If property is purchased in joint tenancy when prices are low and they rise, there may be an income disadvantage, and the saving by avoiding costs of administration of an estate may be more than offset by increased income taxes. If purchased on a high market and values go down, there may be a capital loss, if other than residence property.

2. In the ordinary small estates where Federal estate taxes are not involved and the purchase is made on a high market, joint tenancy is best. In all other cases, all facts should be carefully considered before a decision is made.

3. In some instances where joint tenancy exists, it may be desirable to separate the interests and dissolve the joint tenancy in order to create a more advantageous income tax position or to escape the entire property being taxed upon the death of the survivor.

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[15] C.S.A., Chap. 75A.
[16] I.R.C., Sec. 811 (e).
[17] C.S.A., Ch. 85-8.
[18] I.R.C., Sec. 113(a) (5).
[19] Levy v. Commissioner, 289 U. S. 109.
[20] C.S.A., Sec. 84A-18 (5).

Curative Statutes of Colorado Respecting Titles to Real Estate

By PERCY S. MORRIS,
of the Denver Bar

EDITOR'S NOTE: This is the concluding portion of Mr. Morris' classic, the first half of which appeared in the November DICTA. The whole article is a revision of the one originally published on this subject by Mr. Morris in the February and March 1939 DICTA. An alphabetical index to all subject heading in both installments appears at the conclusion on pages 339 and 340.

LIMITATIONS—MAY BE ASSERTED AFFIRMATIVELY. At common law a statute of limitations is a shield and not a sword; it can at common law be asserted only by way of defense against an action brought by another and not affirmatively as basis for an action. However, 1927 S. L. 604, Sec. 41, 1935 C.S.A. Ch. 40, Sec. 148, provides that the limitations "herein provided for" (evidently meaning the limitations provided in the entire Chapter 150 of the 1927 Session Laws) may be asserted either affirmatively or by way of defense and may be used in any action as a source of, or as a means to, establish title or the right of possession or as an aid or explanation of title and that actions may be maintained affirmatively to establish the limitations provided in said Chapter 150 of the 1927 Session Laws. In *Federal Farm Mortgage Corporation v. Schmidt,* 109 Colo. 467, 473, 126 Pac. (2d) 1036, our Supreme Court said that it is true that, as a general rule of law, statutes of limitation are held to be available only as a matter of defense or bar to the bringing of an action, but that, because of the provisions of this section, the general rule had no application. It held the General Assembly had the power to pass such legislation and that, having in mind the intent and purpose of the entire 1927 Act, permission to assert affirmatively the limitations contained therein included such as are found in the sections discussed herein under the heading Decrees, Judgments and Official Deeds.

LIMITATIONS—PERSONS UNDER DISABILITY. Many of the curative statutes herein discussed are statutes of limitation which make no exception in the case of minors, mental incompetents or others under legal disability. That these statutes operate to bar the rights of all persons, whether under legal disability or not, seems clear from the decision of our Supreme Court in a case involving a limitation contained in the Workmen's Compensation Act, in which the Court held that, unless specific exception is made in the statute of limitations in favor of those under disability, courts are without power to add such exception. *Miller v. Industrial Commission,* 106 Colo. 364, 367, 105 Pac. (2d) 404. *A fortiori,* a statute such as 1935 C.S.A. Ch. 40, Sec. 147, mentioned under the heading Decrees, Judgments and Official Deeds, which imposes upon persons under legal disability a limitation period which is two years longer than the one imposed upon persons not under legal disability, is unquestionably valid.

MECHANIC'S LIENS. One of the most perplexing problems of attorneys examining titles has been the situation where a mechanic's lien claim was filed of record a long time before the examination and the abstract shows no release of the lien claim and nothing indicating any suit brought to foreclose it. The statutes have always imposed a limitation of six months after the completion of the entire work within which to bring the suit to foreclose a mechanic's lien, and under the decisions, if the suit was not brought within that period, the lien was lost. However, if the suit had been brought within that period, then the lien was preserved until the determination of such suit and, if such determination was one which sustained the lien, then such lien continued thereafter indefinitely. An attorney might check the records in the offices of the Clerk of the County Court and the Clerk of the District Court of the county wherein the real estate was situated and might ascertain from same that no suit to foreclose the lien had been brought in either of said courts. Nevertheless the Supreme Court in *Fletcher v. Stowell,* 17 Colo. 94, 28 Pac. 326 and *Burton v. Graham,* 36 Colo. 199, 84 Pac. 978 held that a suit respecting real estate may be brought in any county in the state subject only to the right of a defendant to move for a change of venue and, if no such motion is made, the court has full jurisdiction. Therefore, so far as the examining attorney could know, a suit might have been brought in any one of the sixty-three counties in the state to foreclose the lien and such suit might still be pending, or a judgment sustaining the lien may have been entered although not followed by any recording of a certified copy of the judgment or a Sheriff's Certificate of Purchase or a Sheriff's Deed. To remedy this situation a statute was passed in 1915 (1915 S. L. 333; 1921 Comp. Laws, Sec. 6451; 1935 C.S.A. Ch. 101, Sec. 24) which provided that, in order to hold the lien, the suit must not only be commenced within said period of six months but a notice of *lis pendens* must be filed within that period in the office of the Recorder of the county wherein the land involved is situated. However, in the case of *Laverents v. Craig,* 74 Colo. 297, 225 Pac. 250, the Supreme Court in effect nullified this provision, holding, because of certain phraseology in the statute and because of the general nature of *lis pendens,* that the filing of the *lis pendens* was required by the statute only for the "protection of third parties who might deal with the property in ignorance of the contractor's claim" and that the *lis pendens* is "not a necessary prerequisite of a suit where the action is against the owner of the property, or one primarily liable for the debt". This left for the title attorney the problem as to how his client could "deal with the property in ignorance of the contractor's claim" when the abstract showed a notice of the lien of the contractor. In order to remedy this situation a statute was passed by the 1937 Session of the Legislature (1937 S. L. 481, Sec. 4; 1935 C.S.A. Suppl. Ch. 101, Sec. 24) changing in various respects the phraseology of the previous statute so as to make it more clear and explicit and adding the words "as against the owner of the property or as against one primarily liable for the debt upon which the lien is based or as against anyone who is neither the owner of the property nor one primarily liable for such debt." To extend these provisions to lien claims filed before the passage of the statute, there was at the same time adopted a new section (1937 S. L. 482, Sec. 5; 1935 C.S.A. Suppl. Ch. 101, Sec. 24 (1)). This provides that no lien statement filed for record prior to the date when such section took effect shall "as against the owner of the property or as against one primarily liable for the debt upon which the lien is based or as against anyone who is neither the owner of the property nor one primarily liable for such debt," hold the property longer than one year after the date when such section took effect, unless an action shall have been commenced prior to the expiration of said one year to enforce the same and unless also, prior to the expiration of said one year, there shall have been filed for record with the Recorder of the county in which the property is situated either a notice stating that such action has been commenced, or a certified copy of a decree or judgment enforcing such lien rendered in such action, or a certificate of purchase evidencing the purchase of the property at a sale thereof made pursuant to the provisions of a decree or judgment rendered in such action, or a deed conveying the property under such a sale.

MORTGAGES. See Liens—Extinguishment of; and Limitations—Lien Barred when Indebtedness is Barred.

NAMES, VARIANCES IN. When a man or a woman executes a conveyance of or an encumbrance upon real estate, he or she is often not particular as to whether his or her name, as it appears in the paper he or she signs, is identical with his or her name as it appeared in the instrument by which the title was acquired. As the result, attorneys have been plagued with questions such as: Is the title acquired by a deed to John T. Jones conveyed by a deed naming him as J. T. Jones, or *vice versa?* Is the title acquired by a deed to J. T. Jones conveyed by a deed naming him as J. Thomas Jones, or *vice versa?* The decisions, either of the Colorado courts or of the courts outside Colorado, did not settle these questions. So in 1941, there was enacted a statute (1941 S. L. 607-608; 1935 C.S.A. Suppl. Ch. 40, Sec. 117 (4)) which provided that variances between any two instruments affecting the title to the same real property, both of which shall have been of record for more than three years in the office of the Recorder of the county in which such real estate is situate, with respect to the names of persons named in the respective instruments or acknowledgments thereto or in the signatures thereto in the particulars hereinafter mentioned, irrespective of which one of the two instruments was prior in point of time to the other and irrespective of whether the instruments were executed or originated before or after the time when the statute took effect, shall not destroy or impair the presumption that the person so named in one of said instruments was the same person as the one so named in the other which would exist if the names in the two instruments were identical. Such statute further provided that, in spite of any such variance, the person so named in one of said two instruments shall be presumed to be the same person as the one so named in the other until such time as the contrary appears and, until such time, either or both of such instruments or the record thereof or certified copy or copies of the record thereof shall be admissible in evidence in the same manner as though the names in the two instruments were identical. The variances which are mentioned in the statute as not impairing the presumption that would exist had the names been identical are the following: (1) The full Christian name appearing in one instrument and only the initial letter of that Christian name appearing in the other; (2) the full middle name appearing in one instrument and only the initial letter of that middle name appearing in the other; and (3) the initial letter of a middle name appearing in one and not in the other. The statute further stated that the word "instruments" as used therein means not only instruments voluntarily executed but also papers filed or issued in or in connection with actions and other proceedings in court and orders, judgments and decrees entered therein and transcripts of such judgments and proceedings in foreclosure pursuant to powers of sale. In Title Standard No. 18 it was stated that names in birth certificates, death certificates and marriage certificates are within the effect of this statute. It is to be noted that the curative effect of this statute is limited to the three respective situations above listed and that the statute does not operate to remedy defects existing from other variances in names or from the combination in the same name of two of the variances mentioned in the statute. For example, after both instruments have been of record for more than three years, the name J. T. Jones appearing in one of them could, under this statute, be presumed to designate the person named in the other instrument as John T. Jones or as J. Thomas Jones or as J. Jones, but could not, under such statute, be presumed to designate the person named in the other instrument as John Thomas Jones. However, where both instruments have been of record for more than twenty years, many defects caused by variances in names which are not corrected by the operation of this 1941 statute may be remedied by the operation of the 1927 statute discussed under the heading "Recitals Prima Facie Evidence," especially where the later of the two instruments is a warranty deed containing the customary recitals that the grantor is the owner of the property and has good right, full power and lawful authority to convey the property. And, although it does not belong in an article on curative statutes, the writer cannot resist the urge to make the statement at this point that many variances in names which are not covered by the two statutes that have been mentioned may be disregarded if the instrument executed by the person in question contains an acknowledgment in proper form naming him by the proper name. See Patton on Titles, page 213, Section 53 and *Chivington v. Colorado Springs Co.*, 9 Colo. 597, 604, 14 Pac. 212.

OFFICIAL DEEDS. See Decrees, Judgments and Official Deeds; and Official Sales.

OFFICIAL SALES. It sometimes is found that a Sheriff's Certificate of

Purchase or a Public Trustee's Certificate of Purchase was recorded and no Sheriff's Deed or Public Trustee's Deed was ever executed and recorded based upon such sale. Because of this there were passed in 1937 two sections (1937 S. L. 472-473, Secs. 1 and 2; 1935 C.S.A. Suppl. Ch. 40, Secs. 164 and 164 (1)). Said Section 164 included a new provision that the deed shall be issued by the Trustee, Sheriff or other official within nine months from the expiration of the last period of redemption and not thereafter. Said Sec. 164 (1) provides that, if the person entitled to the deed shall not apply for the deed within such nine months or if no such deed be issued to him within such period, all rights under the Certificate of Purchase, including any rights of any lienor who has redeemed therefrom, shall terminate, and no person shall be entitled to receive such deed, and the official who made the sale shall not have the power to execute such deed. Such section then provides: that after such nine months the holder of the Certificate of Purchase, if no redemption has been made, or the lienor last redeeming shall have a lien on the property sold superior and prior to all liens and encumbrances recorded subsequent to the recording of the lien on which the sale was based, for the amount which would have been necessary to redeem the property on the last day of the last period of redemption, plus interest thereon and all taxes, insurance premiums and other lawful and proper charges advanced or paid by such person; that such lien may be enforced only by an action commenced in the proper court to foreclose the same in the manner and method provided by law for the foreclosure of mortgages; that such lien shall continue in effect only for fifteen months from the date when such person became entitled to a deed; and that after the expiration of such fifteen months, if no action to foreclose such lien has been commenced and no *lis pendens* of such action has been filed as provided by law, then it shall conclusively be presumed that such lien has been paid and discharged and no release or other acquittance shall be necessary or required to discharge such lien. Such section further provides: that in cases where the property had been sold before the section took effect, and the party entitled to a deed had not received it, he may apply for such deed and receive it within nine months from the date that said section became effective; that, if he fails to do so, then he may commence an action within fifteen months from the date when the section became effective to foreclosure such lien and not thereafter; and that, if no action to foreclose such lien has been commenced and no *lis pendens* of such action has been filed as provided by law within such fifteen months, then it shall be conclusively presumed that such lien had been paid and discharged and no release or other acquittance shall be necessary or required to discharge such lien. In *Green v. Hoefler,* 115 Colo. 287, 290-291, 173 Pac. (2d) 208, our Supreme Court held that, the holder of the Certificate of Purchase having made no demand for a deed, and having brought no action to foreclose, and having filed no *lis pendens,* within fifteen months after the first date when she became entitled to a deed, it must, under the mandate of this statute, conclusively be presumed that the lien evidenced by the Certificate of Purchase had been paid and discharged and that her action thereafter was barred by the limitation of this statute.

OPTIONS TO PURCHASE. Previous to 1927 considerable difficulty was encountered through the owner of property having given an option to purchase the property, which option was recorded but no sale and conveyance thereunder was ever consummated. Such options constituted clouds upon the title because the fact that they were of record gave notice of possible rights of the optionee. Anyone dealing with the property was put upon the duty of inquiring as to whether the optionee had, in accordance with its terms, tendered performance and payment. Therefore in each such case it was necessary to secure a quit claim deed from the optionee or to quiet title. To remedy these situations there was in 1927 enacted a section (1927 S. L. 591, 1935 C.S.A. Ch. 40, Sec. 116) which provided that recorded instruments of the nature of an option to purchase, affecting title to real property, under the terms of which possession is not delivered to the purchaser, shall not constitute notice to any person for a period of more than one year after the time specified therein for the conveyance of the property and that after the expiration of such period such instrument shall cease to be notice to any person for any purpose. Such section further provided that all such instruments which shall have been recorded prior to the time the section took effect shall constitute notice only for one year from the time the section goes into effect or for one year from the time in said instruments specified for performance, whichever of the two times shall be the later, and thereafter the same shall cease to be notice to any person for any purpose. Such section contained the proviso that if, prior to the expiration of said period, legal notice of the pendency of an action be filed for record, then such instrument and *lis pendens* shall continue to be notice until three months after the final termination or disposition of the suit. It is to be noted that the provisions of this section relate only to instruments "of the nature of an option to purchase * * * under the terms of which instruments possession is not delivered to the purchaser." Therefore, the provisions of this section do not apply to the customary form of a contract of sale under the terms of which the purchaser makes a down payment and thereafter makes periodical payments and during the period of the making of such payments he is entitled to possession of the property. Particular attention should be given to whether the instrument in question is of the nature of an option to purchase, or is of the nature of a binding contract for the sale and purchase, and to whether, by the terms of the instrument, possession of the property is delivered to the purchaser.

PUBLIC TRUSTEES. See also: Decrees, Judgments and Official Deeds; Estates—Foreclosure of Deeds of Trust against; Liens—Extinguishment of; Public Trustee's Sales—Place of Sale; Releases before Maturity; Releases of Trust Deeds—to Whom Made; Successors in Trust; and Trust Deeds Merely Liens.

PUBLIC TRUSTEE'S SALES—PLACE OF SALE. When the present Denver City and County Building was built and occupied and the old Court House was vacated and shortly thereafter torn down, the situation arose of most deeds of trust, which had been previously executed, having prescribed that the place of sale thereunder should be either the encumbered premises or the Tremont Street front door of the Court House. Since there was no longer any Tremont Street front door of a Court House in Denver, this situation was the subject of some discussion among the attorneys. Accordingly, there were passed in 1933 four sections (1933 S. L. 793-794, 1935 C.S.A. Ch. 40, Secs. 58-61) which made valid sales by Public Trustees, both those previously made and those made in the future, where they were or are made at the Bannock Street main entrance to the new City and County Building in Denver or at the door, side or entrance of the Court House which shall have been destroyed or removed or the site thereof otherwise changed or at the door, side or entrance of any new Court House or any building or place temporarily serving as a Court House or at the place specified in the trust deed, even though the Court House was not there maintained at the time of the sale or at any door, side or entrance of the new City and County Building in Denver or at any door, side or entrance of a new Court House or building or place temporarily used for a Court House. They provided a limitation of ninety days after the sections took effect for the bringing of a suit or proceeding based upon a claim that the sale was held at the place designated in the trust deed which was no longer at the time of the sale a Court House, or upon the ground that such sale was held at a place not designated in the trust deed but which was then actually a Court House.

RECITALS PRIMA FACIE EVIDENCE. Occasionally in examining a title it is found that there is a defect in the title which requires, in order to correct it, the perpetuation of testimony or a declaratory judgment to establish certain facts or a suit to quiet title and it is found that certain recitals in instruments of record set out the required facts. In the absence of a statute, these recitals would not constitute any evidence but would be self-serving declarations or hearsay. Believing that, where an instrument in the chain of title to a piece of real estate contains a recital of certain facts and such instrument has been of record a long time without anyone bringing any legal proceeding to challenge the truth of such facts, such recitals should be admissible in evidence as *prima facie* evidence of the truth of the facts set forth therein, a statute was passed in 1927 (1927 S. L. 589; 1935 C.S.A. Ch. 40, Sec. 112). It provided that all recitals contained in instruments affecting title to real estate, which have remained or shall have remained of record in the office of the Recorder of the county where the real property affected is situated for a period of twenty years, shall be accepted and received as *prima facie* evidence of the facts recited therein, except as to recitals which are mentioned herein under the heading Reference to another Instrument. This statute is the basis for Title Standards Nos. 19, 51 and 59.

RECORDING A LONG TIME AFTER EXECUTION OF INSTRUMENT. Very often in examining a title an attorney finds that a deed was not recorded until a long time after its execution. In 1928 our Supreme Court in its decision in *Larison v. Taylor,* 83 Colo. 430, 442, 266 Pac. 217, said: "There is no presumption of the delivery of a deed where it is not recorded until long after its date." This immediately placed a serious question upon the validity of any deed which had not been recorded until long after its date. It also, in connection therewith, imposed upon examining attorneys the responsibility of passing upon the question of what period would constitute "long after its date," which to the writer is very much like the question "How long is a piece of string?" It also raised the question of whether, assuming that the deed had not been recorded until long after its date, the defect occasioned thereby would be corrected by any lapse of time after it was recorded and, if so, how long a lapse of time is required. This decision was probably the cause of attorneys receiving more money in fees for bringing suits to quiet title than any other event in the history of the Colorado bar. To remedy this situation there was passed by the 1937 Session of the Legislature (1937 S. L. 477) an amendment of 1935 C.S.A. Ch. 40, Sec. 107, the section prescribing the form of acknowledgment and the effect thereof. This amendment, as corrected by an amendment passed by the 1939 Session (1939 S. L. 289-290; 1935 C.S.A. Suppl. Ch. 40, Sec. 107), reenacted the previous statute except that at the end of the last paragraph of the section it added the following language: "irrespective of the length of time that may have elapsed between the date of such instrument and the date when such instrument was so recorded. The provisions hereof shall relate and apply to all instruments which shall have been executed prior to the time when this section takes effect, as well as to all instruments which are executed after the time when this section takes effect, irrespective of whether such instruments shall have been acknowledged before or after the time when this section takes effect and irrespective of whether such instruments are recorded before or after the time when this section takes effect."

REFERENCE TO ANOTHER INSTRUMENT. Previous to 1927 attorneys had a great deal of trouble through recorded instruments in the chain of title containing a reference to some other instrument which either was not of record or, if of record, was not correctly described in the reference. This trouble arose most frequently through incorrect description of an encumbrance of record; for example, a deed of record might contain a provision that it was "subject to a mortgage of $2,000.00." In such case there might be of record no mortgage securing $2,000.00 but there might be of record a deed of trust securing $2,000.00 or an encumbrance, either trust deed or mortgage, which originally secured $2,500.00 which amount had at the time the deed was executed been reduced to $2,000.00. The attorneys felt that there was serious danger of it being held that a deed of trust was not a "mortgage" or that, in view of the difference in the amount of the encumbrance mentioned in the deed and the amount of the encumbrance of record, it might be claimed that the one did not refer to the other, with the result that the recital in the deed might be taken to refer to an instrument which had not been recorded and put everyone dealing with the property on notice that there was an unrecorded "mortgage of $2,000.00." And it was felt that in other cases the reference in an instrument to some other instrument, where the latter was not of record, would put each person dealing with the property upon notice of the existence of such unrecorded instrument, with the duty of pursuing an investigation to ascertain the terms of such unrecorded instrument, with the consequent clouding of the title. To remedy this situation there was passed in 1927 a section (1927 S. L. 589; 1935 C.S.A. Ch. 40, Sec. 113) providing that, when an instrument affecting title to real estate shall have been recorded and contains a recitation of or reference to some other instrument purporting to affect title to said property, such recitation or reference shall bind only the parties to the instrument and shall not be notice to any other person whatsoever, unless the instrument mentioned or referred to in the recital be of record in the county where the property is situated and, unless it is so recorded, no one other than the parties to the instrument shall be required to make any inquiry or investigation concerning such recitation or reference and that, as to recitations or references contained in instruments recorded prior to the time when the statute took effect, the same shall, after the expiration of one year from the date when the statute took effect, cease to be notice unless the instrument referred to in the reservation, exception or reference be actually recorded within said one-year period. In *Rocky Mountain Fuel Company v. Clayton Coal Company,* 110 Colo. 334, 340, 134 Pac. (2d) 1062, our Supreme Court held that this section was conclusive on the point that a reference in a recorded lease to an unrecorded contract of sale bound only the parties to the lease and was not notice to any other person whomsoever.

RELEASES BEFORE MATURITY. In the old days many attorneys questioned whether the fact that a release was executed before the maturity of the indebtedness secured by a trust deed did not put any subsequent purchaser or encumbrancer upon inquiry as to whether the note secured by the trust deed was owned by the original payee at the time of the release or, if it had been transferred to someone else before maturity, as to whether the then owner of the note had requested the execution of the release. Accordingly, in 1893 there was passed a section (1935 C.S.A. Ch. 40, Sec. 83) providing that the recital in any release or partial release of a deed of trust of the payment or partial payment of the indebtedness secured by such trust deed shall, as to subsequent purchasers or encumbrancers of the property mentioned in the release, be evidence of such payment so as to give full effect to such release when such release was executed before maturity of said indebtedness, if the release was duly and legally executed by the proper trustee according to the purport thereof, to the same extent and with the same force as the release of any trust deed when executed after the maturity of the indebtedness.

RELEASES OF TRUST DEEDS—TO WHOM MADE. Until comparatively recent years it had been uniformly held by the Supreme Court that, although a mortgage constituted only a lien, a deed of trust with power of sale conveyed to the trustee the legal title to the property. See decisions cited under the heading Trust Deeds Merely Liens herein. Therefore, in a case where the maker of the deed of trust afterwards conveyed the property by quit claim deed and the subsequent release with its usual words of conveyance of title, as well as of release, was made to the person who had executed the deed of trust instead of to the then owner, such release conveyed to the original owner the naked legal title to the property, leaving his grantee owning only an equitable title. Because of this, very often in cases of this kind examining attorneys required quit claim deeds from the original owners. Because of this situation, in 1893 a section was adopted (1935 C.S.A. Ch. 40, Sec. 84), providing that all releases of deeds of trust theretofore or thereafter made shall be good and valid as to the recitals therein, whether made to the original maker of said deed or to a subsequent purchaser of the premises in such release described, and there was adopted in 1927 a section (1927 S. L. 593; 1935 C.S.A. Ch. 40, Sec. 120) providing that all instruments executed for the purpose of releasing any lien or encumbrance against real property shall be considered only as discharging and cancelling such lien or encumbrance and that no such release shall convey to any person except the record owner of the property any right, title or interest in the property and that words of conveyance used in any such release shall be construed only as in such section provided.

REPRESENTATIVES. See Decrees, Judgments and Official Deeds; Estates—Commenced in Wrong County; Estates—Sales in, not to be Invalidated; Signatures of Those Acting in Representative Capacity; Successors in Trust; Trustees; and Wills—Powers of Sale under.

SEALS. Under the common law a seal was required on every instrument conveying or encumbering real estate. No practical purpose is under present-day practice served by the requirement that a seal be so affixed and it very often is found that an instrument affecting the title to real estate was executed and recorded which did not contain near the signature the word "Seal" or any other form of seal and it was quite uncomfortable to an examining attorney to have to turn down the title because of the omission of this formality. Accordingly, in 1917 there was adopted a statute (1917 S. L. 161, Sec. 5; 1935 C.S.A. Ch. 40, Sec. 15) providing that it shall not be necessary to the proper execution of any conveyance affecting real property that the same shall be executed under the seal of the grantor nor that any seal or scroll or other mark be set opposite the name of the grantor. This statute, however, does not do away with the necessity of the corporate seal being affixed to a conveyance or encumbrance executed by a corporation. See 1935 C.S.A. Ch. 40, Sec. 39 and Ch. 41, Sec. 20.

SHERIFFS' DEEDS. See Decrees, Judgments and Official Deeds; and Official Sales.

SIGNATURES OF THOSE ACTING IN REPRESENTATIVE CAPACITY. It often happens that a person holding an interest in or lien on real estate in an official or representative capacity omits to place following or below his signature to the instrument his official or representative designation, such as "President," "Trustee," etc. Formerly this happened frequently in the execution by a private trustee of a release of a deed of trust through his omitting to place the word "Trustee" after his signature. To correct this, 1927 S. L. 605, Sec. 45; 1935 C.S.A. Ch. 40, Sec. 152, provides that, where from the body of an instrument it is apparent that a person is conveying or is acting in some official or representative capacity and the signature to the instrument omits the statement of the official or representative capacity, it shall be presumed that the official or representative capacity is a part of the signature.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT. The Soldiers' and Sailors' Civil Relief Act of 1940, as amended, definitely is not a curative statute. In fact, it has been the cause of much perplexity and doubt on the part of title examiners. A reference to it in this article on curative statutes is necessary because of its effect upon certain of the curative statutes herein discussed. For discussions of its provisions with respect to real estate titles, reference is made to the following articles which have appeared in DICTA: by L. A. Hellerstein in the October and November 1940 issues; by the writer of this article in the December 1940 issue; by Wm. Hedges Robinson, Jr. in the November 1942 issue; and by Royal C. Rubright in the January 1944 issue. Section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended in 1942, provides that the period of military service shall not be included in computing any period then or thereafter to be limited by any law, regulation or order for the bringing of any action or proceeding by or against any person in military service or by or against his heirs, executors, administrators or assigns and that no part of the period of military service which occurs after the date of the enactment of the amendments of 1942 shall be included in computing any period then or thereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax or assessment. Many of the curative statutes discussed in this article are in the form of statutes of limitation upon the bringing of an action and therefore they came within the provisions above mentioned of the Soldiers' and Sailors' Civil Relief Act. The position taken by the Title Standards Committee of the Denver Bar Association and approved by the Colorado Bar Association at its annual convention on this point is stated in the following language of the note to Title Standard No. 49, which was promulgated November 8, 1946 and relates to the sections discussed herein under the heading Liens—Extinguishment of: "When Standard No. 24" (which was promulgated in 1942 and in which it was stated that, because of said provisions of the Soldiers' and Sailors' Civil Relief Act, an attorney should not, in reliance on said sections, render an opinion showing title free and clear of an unreleased encumbrance falling within such sections) "was first adopted we were actively engaged in war, with millions in the service; however, more than a year has passed since V-J Day, and under present conditions the Standard should be amended and the Statute given full force and effect notwithstanding the Soldiers' and Sailors' Civil Relief Act". The policy expressed in the above quotation has been followed by the Colorado attorneys generally by their giving effect, in determining the merchantability of titles, to the various curative statutes, even though they are in the form of statutes of limitation. The customary practice of the attorneys generally of the community is a very important factor in determining whether a title is merchantable. The circumstance that there is a possibility that the title may be held by a court to be invalid because of a fact that does not appear on the face of the records and is not known to exist does not necessarily mean that the title is unmerchantable; for example, a title may be perfect on the face of the records and yet be bad as a matter of fact, because the signature to a deed was forged or, even if it were the genuine signature of a person bearing that name, nevertheless that person was not the person of the same name to whom the property had been conveyed, or the person who executed the deed was a minor or a mental incompetent, or a deed which is on record had never been delivered; and yet, attorneys uniformly pass titles as merchantable in spite of such possibilities. And, for the same reasons, with the fighting war over more than four years ago and the personnel of the armed forces long since reduced to a peace-time basis and the number of men and women in military service reduced to an exceedingly small fraction of their number during the fighting war, the infinitesimal chance that someone claiming an interest in the property may establish that his military service was such as to prevent a curative statute in the form of a statute of limitation from barring his claim should not require the rejection of the title as unmerchantable.

SUCCESSORS IN TRUST. Prior to 1894, when the Public Trustee Act was passed, deeds of trust were executed to private trustees. They usually named as successor in trust, in the case of death, refusal or inability to serve, removal, absence, etc., someone else, either a named individual or a designated public official. And, even since the passage of the Public Trustee Act, the same practice has been followed with respect to trust deeds to private trustees. In cases, particularly under old deeds of trust, where no public official was so designated as successor and both the private trustee and the person named as successor died or moved away or were absent or refused or were unable to act and a release of the deed of trust or a foreclosure sale under it was desired, there was no one who could legally execute the release or make the sale. Because of this situation there was passed in 1915 a statute (1915 S. L. 478-479; 1935 C.S.A. Ch. 40, Secs. 62 and 63) which provided that under the circumstances above mentioned the Public Trustee of the county in which the property involved is located should accept and discharge the duties of trustee or successor in trust under such trust deed at the request of any person interested in the property conveyed by it or the debt secured thereby upon satisfactory proof of the death, absence, refusal or inability to act of both the trustee and the successor in trust named in the trust deed; with the further provision that he shall recite the fact of such death, absence, inability or refusal to act in his trustee's deed or deed of release; and with the express provision that the section should not apply to continuing offices or officers named as trustees or successors in trust. And by 1927 S. L. 606, Sec. 48; 1935 C.S.A. Ch. 40, Sec. 155, it is provided that, upon the death of a sole trustee or the surviving trustee of an express trust created by any written instrument affecting title to real property, the trust shall not descend to the heirs of such trustee nor pass to his personal representative, but that the trust, if then unexecuted, shall vest in the then Public Trustee and his successors in office of the county wherein the real estate is situate, with all the powers of the original trustee, except that, in cases where by law or by the instrument a successor in trust is provided, the trust shall vest in such successor; with the proviso that the District Court may upon application of any party in interest appoint a new trustee.

TAX SALE CERTIFICATES, LIMITATION UPON. There often is shown in an abstract a tax sale certificate issued many, many years before with no redemption from the tax sale and no tax deed issued upon it. Its holder, in most cases, did not care to pay the taxes falling due on the property each year subsequent to its issuance and in practically every instance its owner had, as a matter of fact, abandoned his claims under it. However, it remained on the records as an encumbrance on the property, even though it had been abandoned for fifty years and, when an official certificate of taxes due was secured from the Treasurer, it was shown thereon. There was no reason why this condition should continue forever, any more than it should with respect to unreleased mortgages and deeds of trust (see Liens—Extinguishment of). And so there was enacted 1945 S. L. 671 which, as amended by 1947 S. L. 737-739, 1935 C.S.A. Suppl. Ch. 142, Sec. 211 (4), provided that no lien upon real property created by tax certificates or certificates of purchase theretofore or thereafter issued by any County Treasurer on account of delinquent taxes or assessments should remain a lien for a period longer than fifteen years after the original issuance thereof and that no Treasurer's deed should issue on any tax sale evidenced by any such certificate where it shall have ceased to be a lien pursuant to the provisions of said statute and application for such Treasurer's deed was not pending at the time of the expiration of the limitation period provided by said statute. It further provided that all unredeemed certificates upon which a tax deed had not been issued, which should have been issued before the effective date of said statute and were fifteen or more years old or would become fifteen years old before May 1, 1947 should remain in full force and effect until May 1, 1947, provided, however, that, should the holder hereof commence proceedings to procure a tax deed by making a demand upon County Treasurer for same on or before May 1, 1947, his right to receive a tax deed should not be invalidated by the provisions of the statute. It excepted from its provisions certificates issued to and held by the county, city, city and county or district levying the tax on which the certificate was issued, but, in the event of an assignment of such a certificate, its lien should cease fifteen years after its date of issuance; provided, however, that if the certificate was fifteen years old at the time of such assignment or would become fifteen years old within one year from the date of such assignment, the assignee should be entitled to a tax deed if proceedings to procure a tax deed were instituted by making a demand upon the County Treasurer for same within one year from the date of the assignment by the county, city, city and county or district levying the tax. It further required the County Treasurer, immediately upon the expiration of the lien created by the certificate by reason of this statute, to issue a certificate of cancellation and to present it to the Recorder who shall enter it in his tax sale record and file it and it provided that such certificate of cancellation and the record thereof shall be *prima facie* evidence of the cancellation of the tax sale certificate and of the release of the lien thereof.

TAX SALES—REDEMPTION BY PERSONS UNDER LEGAL DISABILITY. 1935 C.S.A. Ch. 142, Sec. 265 allowed minors and mental incompetents to redeem from tax sales until the expiration of one year after the removal of their respective disabilities and Section 274 of the same Chapter specified the manner in which they should make the redemption. On the principle that, in cases where a tax deed has been issued upon a tax sale, persons under legal disability should not have any longer period in which to redeem from the sale than they would have in which to bring an action to set aside the tax deed (see Decrees, Judgments and Official Deeds), the Legislature in 1947 enacted a statute (1947 S. L. 740-741, 1935 C.S.A. Suppl. Ch. 142, Sec. 274) which amended said Section 274 so as to provide a limitation of the period for redemption from tax sale by persons who are under legal disability at the time of the execution and delivery of the tax deed to nine years from the date of the recording of such tax deed, with the provision that, if the disability be removed or cease within such nine year period, the redemption must be asserted and take place within two years after the removal or cessation of the disability, but that all redemptions under such statute must take place within nine years of the recording of the tax deed, irrespective of the time that the disability was removed. This statute further provided that all persons against whom the new limitation created by the statute shall have expired on the effective date of the statute or shall expire within six months from such effective date may assert their rights of redemption within six months from such effective date and not thereafter. Those who prepared this amendment evidently overlooked repealing said Section 265 and it is contemplated that a bill to repeal it will be introduced in the next session of the Legislature. Such bill will probably also provide for the amendment of Section 262 of the same Chapter (which is the five-year statute of limitations) so as to delete the provision which extends the period of limitation of that statute, as to persons under legal disability, to one year after removal of disability. This, of course, has nothing to do with the limitations provided in 1935 C.S.A. Ch. 40, Secs. 146 and 147 (see Decrees, Judgments and Official Deeds), since the bar of either of said two statutes of limitation will apply to any case falling within its provisions without regard to the provisions of the other.

TITLE STANDARDS. Numerous references have been made in this article to title standards. In 1941 a Committee on Real Estate Title Standards of the Denver Bar Association was created and on February 2, 1942 that committee was empowered by the association to promulgate and announce such standards concerning the examination of abstracts of title as from time to time may be approved by the committee. Such committee, under the capable and intelligent chairmanship of Edwin J. Wittelshofer, has issued up to this time a total of sixty-two title standards. Each standard sets out a problem which not infrequently is encountered by Colorado attorneys in examining titles and gives the answer of the committee thereto. Most of the local bar associations in Colorado outside of Denver have, from time to time as they have been promulgated by the Denver committee, approved and adopted these standards. In addition thereto, upon the recommendation of the Real Estate Title Standards Committee of the Colorado Bar Association, of which committee, also, Mr. Wittelshofer has been the chairman since its creation, the Colorado Bar Association has at its annual convention each year adopted the title standards promulgated by the Denver committee during the preceding year, so that all of the sixty-two standards issued up to this time are standards both of the Denver Bar Association and of the Colorado Bar Association. These standards have been of great assistance to attorneys throughout the state in establishing, through voluntary acceptance of them by the attorneys, uniform practice with regard to the various problems covered by them. No small part of such voluntary acceptance of the the standards by the attorneys has been due to the fact that the Denver committee, in choosing the problems to be covered by the standards which it issues, has been careful to select only those problems its answers to which the committee felt confident could be successfully maintained in the courts.

TRUST DEEDS MERELY LIENS. Until 1934, when it used language to the contrary (*Wright v. Halley,* 95 Colo. 148, 151-152, 33 Pac. (2d) 966; *Tolland Co. v. First State Bank of Keenesburg,* 95 Colo. 321, 324-325, 35 Pac. (2d) 867), our Supreme Court had held in numerous cases that deeds of trust (meaning deeds of trust to private trustees executed before the passage of the Public Trustee Act in 1894 and deeds of trust to the Public Trustee executed thereafter) did not merely create liens but constituted conveyances of the legal title to real estate. *Stephens v. Clay,* 17 Colo. 489, 491, 30 Pac. 43; *Reid v. Sullivan,* 20 Colo. 498, 502, 39 Pac. 338; *Belmont Mining & Milling Co. v. Costigan,* 21 Colo. 471, 479, 42 Pac. 647; *Holmquist v.*

Gilbert, 41 Colo. 113, 118, 92 Pac. 232; *Foot v. Burr*, 41 Colo. 192, 198, 92 Pac. 236; and *Bankers Building & Loan Association v. Fleming Brothers Lumber Co.*, 83 Colo. 335, 338, 264 Pac. 1087. Some of the complications resulting from these holdings are mentioned under the heading Releases of Trust Deeds—To Whom Made herein. It was felt that there should be no more reason for a deed of trust to be deemed to constitute a conveyance of the legal title any more than for a mortgage to do so and that the intention of the parties to a deed of trust is merely to create a lien to secure an indebtedness. Accordingly there was passed in 1927 a statute (1927 S. L. 592, Sec. 12; 1935 C.S.A. Ch. 40, Sec. 118) providing that mortgages, trust deeds or other instruments intended to secure the payment of an obligation affecting title to or an interest in real property shall not be deemed a conveyance, regardless of their terms, so as to enable the owner of the obligation secured to recover possession of real property without foreclosure and sale, but the same shall be deemed a lien.

TRUSTEES. Very often there appears in the chain of title a deed to a certain person followed by the word "Trustee." Under the decisions, this placed everyone dealing with the property upon notice that the grantee acquired and held the title only in a fiduciary capacity and put anyone dealing with the property upon inquiry as to who were the beneficiaries and what were the terms of the trust. Very often the grantee did not in reality hold the property in a fiduciary capacity, but acquired it for himself alone and for reasons of his own had the word "Trustee" added to his name. And, even where the grantee did acquire the property in a fiduciary capacity, in a large number of cases there was no way of placing upon the records in a satisfactory form evidence as to who were the beneficiaries and the terms of the trust, especially where the grantee acquired it for the benefit of others (including often associates of his in the enterprise) who were not named in the deed and there was no written instrument ever executed by the parties evidencing the arrangement or naming the beneficiaries or the terms of the arrangement. In such cases there was no way of making the title good except by a suit to quiet title. To correct this, in 1921 there was passed a statute (1921 S. L. 187, Secs. 1 and 2; 1935 C.S.A. Ch. 40, Secs. 9 and 10) which provided that all instruments conveying real estate or interests therein in which the grantee is described as Trustee, Agent, Executor, etc., or in any other representative capacity, shall name the beneficiary or beneficiaries so represented and define the trust or other agreement under which the grantee is acting or refer by proper description to book, page, etc., to an instrument of public record in the county in which the land is located in which such matters shall appear and that otherwise the description of a grantee in any such representative capacity in such conveyance shall be considered and held a description of the person only and shall not be notice of a trust or other representative capacity of such grantee; with the further provision in the second section that unless, within five years after the sections became effective, there was filed for record in such county, so that such record shall appear in the chain of title to the land, a statement duly verified setting forth the name of the beneficiary or beneficiaries and defining the terms of the trust or other agreement establishing the representative relationship or referring by proper description to an instrument of public record in such county in which such matters shall appear, then, at the expiration of such five years, instruments of the kind mentioned in the preceding section, which shall have been executed prior to the time such sections became effective, shall cease to be notice of such trust or representative capacity of the grantee and shall be considered and held to be a description of the person of the grantee only. In *Beatty v. Fellows,* 101 Colo. 466, 470, 74 Pac. (2d) 677, our Supreme Court held that the addition of the word "Trustee" to the name of the grantee in a deed signified nothing, in view of this statute, and that under this statute the word was purely description of the person.

UNRECORDED INSTRUMENTS—AGAINST WHOM INVALID. Prior to 1927 the statute (1921 Comp. Laws, Sec. 4902) provided that instruments affecting title to real estate from and after the filing thereof for record, and not before, shall take effect "as to subsequent *bona fide* purchasers and incumbrancers by mortgage, judgment or otherwise not having notice thereof." It was held in *Carroll v. Kit Carson Land Company,* 24 Colo. App. 217, 133 Pac. 148 and *Brackett v. McClure,* 24 Colo. App. 524, 135 Pac. 1110, that, where there were two chains of alleged title to a piece of real estate, such as the fee simple title deraigned from the United States and a tax title, those acquiring claims under one chain were not "*bona fide* purchasers and incumbrancers" as against those claiming under the other chain under such statute and that therefore one claiming title under one of the chains could not take any advantage under such statute of the failure of one claiming title under the other chain to record the instrument through which he claimed such title. These decisions were based upon previous holdings of the Appellate Courts of Colorado cited in the first of these cases that: "A deed duly recorded is constructive notice of its existence, and of its contents, to all persons claiming what is thereby conveyed under the same grantor by subsequent purchase or mortgage, but not to other persons. * * * Such record is constructive notice only to those who are bound to search for it as subsequent purchasers and mortgagees, and all others who deal with it on the credit of the title in the line of which the recorded deed belongs." In the two decisions of the Court of Appeals which have been cited it was held that a decree in a suit to quiet title in favor of the holder of the tax title did not affect one holding the title deraigned from the United States, the conveyance to whom was not recorded and who had not been made a party to the suit. And in the Carroll case it was further held that the provisions of the Code of Civil Procedure relating to *lis pendens* did not apply as against one claiming under a different chain of title than the chain under which the party filing the *lis pendens* claimed. The effect of these decisions was to prevent a decree purporting to quiet a tax title from making a merchantable title because, although everyone who, according to the records, owned any interest in or lien upon the original title was made a party, nevertheless it might afterward develop that a deed conveying the original title or an encumbrance upon the original title had been executed and not recorded and in such case the decree would be ineffective as to the grantee or encumbrancer under the unrecorded instrument. As the result there were passed in 1927 two sections (1927 S. L. 590, Secs. 8 and 9; 1935 C.S.A. Ch. 40, Secs. 114, 115). The first of these sections provides that all instruments affecting title to real property may be recorded in the office of the Recorder of the county where such real property is situated and that no such instrument shall be valid as against any class of persons with any kind of rights, except between the parties thereto, and such as have notice thereof, until the same shall be deposited with such Recorder. The second of these sections provides that the filing of notice of pendency of an action in compliance with law shall, from time of the filing thereof, be notice to all persons who may subsequently acquire any right, title, interest or estate in and to the real property described in such notice from any grantor or from any source whatsoever. Said Section 8 (Section 114 of C.S.A.) was before the Colorado Supreme Court for consideration in *Moore v. Chalmers-Galloway Livestock Company*, 90 Colo. 548, 10 Pac. (2d) 950, and its validity, constitutionality and applicability were sustained by the Court in that case as against one claiming under a different chain of title whose conveyance was executed eight years before the passage of the new statute and was not recorded during such eight years or during the period of almost two years after the passage of the new statute.

USE RESTRICTIONS. See Building and Use Restrictions.

VACATIONS OF ROADWAYS. Occasionally an attorney was compelled to object to the title to land which had been dedicated to public use as a street, alley or road on the ground that the purported vacation of same did not comply with the technical requirements of our statutes, even though the land had not been used as a roadway for many years and even had been enclosed, with adjoining land, by fences. In 1949 the Legislature enacted 1949 S. L. 620-623 which contained provisions specifying the persons in whom the title to the land included in roadways should vest under various circumstances upon the vacation of such roadways and the manner in which such vacation should be made. Such statute also provided that any written instrument of vacation, or a resubdivision plat purporting to vacate or relocate roadways or portions thereof, which has remained or shall have remained of record in the county where the roadway is situate for a period of seven years shall be *prima facie* evidence of an effective vacation of such former roadways. It further provided that the foregoing shall not apply during the pendency of an action commenced prior to the expiration of said seven years to set aside, modify or annul the vacation, or when the vacation has been set aside, modified or annulled by proper order or decree of a competent court and notice of pendency of action or a certified copy of such decree has been recorded in the Recorder's office of the county where the property is located. Such statute further provided that any limitation established by it shall apply to causes of action which accrued prior to its effective date as well as those accruing thereafter, provided, however, that the right to institute an action shall not be barred by reason of such limitation until the expiration of six months from said effective date.

WILLS—POWERS OF SALE UNDER. In the absence of a statute to the contrary, a power of sale of real estate conferred by will upon an executor cannot be exercised by an administrator with the will annexed unless by the terms of the will the sale of the real estate is mandatory and not discretionary. Because of this there was passed, as a part of the revision made in 1903 of the statutes relating to administration of estates, a section (1903 S. L. 504, Sec. 91; 1908 Rev. Stat. Sec. 7167) providing that whenever any testator shall by his last will direct that his real estate or any of it be sold or otherwise disposed of for the payment of his debts or for any other purpose, and no executor be named therein or if the executor named therein refuse such office or be removed or die, the administrator with the will annexed or *de bonis non* may sell, convey and dispose of such real estate in accordance with the provisions of such will in the same manner and with like effect as the executor in such will and duly qualified might have done. It will be noted that in the early part of this section appeared the words, "shall, by his last will, *direct* that his real estate, or any of it, be sold or otherwise disposed of." Because of this titles were very often objected to because the will did not direct the sale of the real estate in question but merely authorized the sale of the real estate by the executor. By reason thereof the section was amended (1921 S. L. 821, 1935 C.S.A. Ch. 176, Sec. 156) so as to change the words hereinbefore quoted to "shall, by his last will, *confer power* for the sale of his real estate, or any of it, or for its disposition otherwise." In 1947 this section was further amended (1947 S. L. 943, Sec. 11, 1935 C.S.A. Suppl. Ch. 176, Sec. 156) by adding the words "resident or non-resident" and "in the State of Colorado" so as to leave no doubt as to it being applicable to the estates of non-resident testators as well as to estates of resident testators. This section and 1949 S. L. 769-770, Sec. 16 (which amended 1935 C.S.A. Ch. 176, Sec. 62 (d)) relating to the execution of conveyances, encumbrances and contracts by the personal representative or trustee appointed by a court of another state under a will admitted to probate in that state are the basis of Title Standards Nos. 57 and 58.

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Some Problems Concerning Oil and Gas Leases And the Rule Against Perpetuities

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In 1620 the Court of King's Bench held that an executory interest limited upon a freehold estate was indestructible.[1] Having recognized such an indestructible interest, the courts then decided that this principle should not be allowed to go too far toward tying-up property. Thus in 1682 in the now famous *Duke of Norfolk's Case*[2] the character of the modern rule against perpetuities as a rule which prohibited remotely contingent future interests was first clearly laid down. As stated by Professor Gray the rule is: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[3] How does this fundamental rule of property law affect modern versions of oil and gas leases?

Technically, the rule is applied only to the *vesting* of a future interest although many courts loosely apply the rule to such related problems as the permissible duration of private trusts and the permissible period of suspension of the absolute power of alienation. The situation is further clouded by the application of statutes in various states. The scope of this paper will be limited mainly to the application of the rule in its technical sense.

The application of the rule to oil and gas leases arises chiefly from the theory of vesting pronounced in the early case of *Venture Oil Co. v. Fretts.*[4] It was there determined that an oil and gas lessee obtained no vested interest under the lease itself until oil or gas is discovered.[5] This principle naturally led to the contention that interests vested by certain types of oil gas leases were void as violative of the rule against perpetuities.

Assuming the soundness of such theory, it appears that the following types of leases would violate the rule: (1) a lease of the "no term" type used in connection with an "unless" drilling clause,[6] and (2) a lease which uses the "unless" drilling clause in connection with a term of more than twenty-one years. In either of these cases it is possible that the vesting of the lessee's interest on the discovery of oil can be postponed for a period

* Written while a student at the University of Denver College of law.
[1] Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (1620).
[2] 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).
[3] Gray, RULE AGAINST PERPETUITIES (4th ed., 1942) sec. 201.
[4] 152 Pa. 451, 25 Atl. 732 (1893).
[5] The court said: "The title (in any oil lease) is inchoate, and for purposes of exploration only until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right * * *".
[6] i.e., a provision that if the lessee does not drill within a specified time, the lease is to terminate, unless the lessee pays certain sums periodically in advance to keep the lease alive.

beyond lives in being plus twenty-one years for, under such leases, the lessee may delay drilling indefinitely by the payment of a periodic rental. The lessee thus has what amounts to a perpetual option to drill or not to drill, and perpetual options are generally held to violate the rule.[7]

The validity of the "no term" lease was first questioned under the rule against perpetuities in *Wilson v. Reserve Gas Co.*,[8] where the court held that the rule was not violated by a lease for a period of five years and as much longer as either oil or gas was produced, with the further stipulation that the lessee could pay a yearly rental indefinitely in lieu of drilling. The court reasoned that there was nothing in the lease to deny the lessor an implied right to terminate the lease upon reasonable notice. This is clearly unsound and the great weight of modern authority refuses to imply a condition in a lease against delay in development in direct contravention of an express provision providing for such delay.[9]

Recent Decisions Side-Step Issue

The rule pronounced in the *Venture Oil* case [10] has, however, been generally repudiated in recent decisions, and the present tendency is to hold that immediately upon the execution of an oil and gas lease some sort of estate or interest vests in the lessee,[11] thus side-stepping the problem raised by the *Venture Oil* decision.

Another question arises in connection with leases providing for perpetual renewal. Such a covenant, in the absence of a statutory prohibition, is generally held valid on the theory that it is a part of the lessee's present interest,[12] and so there is no remote vesting.

Thus the universal provision for a primary term and as "long thereafter as either oil or gas is or can be produced from any well on said land" is no longer subject to question in most jurisdictions.[13]

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[7] Starcher Bros. v. Duty, 61 W. Va. 371, 56 S. E. 527 (1907) (action for specific performance); Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 128 N. E. 177 (1920) (action for damages). The effect of these cases is that neither an action for damages nor an action for specific performance may be maintained on a perpetual option. See also 162 ALR 581.

[8] 78 W. Va. 329, 88 S. E. 1075 (1916).

[9] Summers, THE LAW OF OIL AND GAS (perm. ed., 1942) sec. 397 and numerous cases cited therein.

[10] Note 4, *supra*.

[11] Rosson v. Bennett, Tex. Civ. App. 1927, 294 S. W. 660; Summers, THE LAW OF OIL AND GAS (perm. ed., 1942) sec. 171.

[12] Thaw v. Gaffney, 75 W. Va. 229, 83 S. E. 983, 3 A.L.R. 495 (1914); Becker v. Submarine Oil Co., 55 Cal. App. 698, 204 Pac. 245 (1924); 3 A.L.R. 498; 39 A.L.R. 280; 162 A.L.R. 1147; Contra: Morrison v. Rossignol, 5 Cal. 64 (1855).

[13] Weber v. Texas Co., 83 F. (2d) 807 (C.C.A., 1936), *cert. denied*, 299 U. S. 561, 57 S. St. 23, 81 L. Ed. 413, where the court said that an option given to lessee to purchase lessor's royalty rights whenever during the duration of such a lease the lessor should offer the same for sale "was within neither the purpose nor the reason for the rule" against perpetuities. However, note the contentions raised in Lloyd's Estate v. Mullen Tractor & Equipment Co., infra Note 18.

Some decisions have construed an oil and gas lease to constitute a *profit a' prendre,* and in such case the rule does not usually apply since a profit is generally a present interest in property.[14] If, however, the profit is to vest at a future date, the rule is applicable.

Several recent cases have presented various facets of the problem. In *Francis v. Superior Oil Co.*[15] the lease provided that it should remain in force for five years from the time when the lessee could legally enter and drill, and so long thereafter as oil or gas was produced on such land. At the time of the execution of the lease, a city ordinance prohibited drilling on the land in question. The court sustained the lease against the contention that it was void for remoteness and that it violated a statute prohibiting suspension of the power of alienation for more than twenty-one years. The court first held that the lessee had obtained a present interest immediately upon execution of the lease in the nature of a *profit a' prendre* and laid much stress on the fact that the parties must have contemplated removal of the restriction within a reasonable time, or, if not, a termination of the lease obligations. In fact, the restriction was lifted within a few months and the property was drilled. This latter reasoning seems tenuous in view of the clear principle that an instrument said to create a perpetuity is to be construed as of the time of its effective date, and if any possibility of remoteness exists under the facts on such date, the interest is void regardless of the intentions of the parties.[16] In this case it was very possible at the time the lease was executed that the ordinance would not be repealed within a period of twenty-one years,[17] and it appears clear from the terms of the lease that the removal of the prohibition on drilling was a condition precedent to the inception of the lessee's interest. Even though a profit is usually not within the scope of the rule, the creation of a profit to vest beyond the period of twenty-one years would come within its condemnation.

But The Rule Cannot Be Ignored

Another interesting case which, although upholding the lease in issue, indicates that the rule against perpetuities cannot be entirely ignored as far as oil and gas leases are concerned arose in Mississippi in 1941.[18] In a suit to cancel a lease, the issue in the *Venture Oil* and *Wilson* cases was again presented. The lease provided for a term of five years from the date of execution and "as much longer as oil, gas or either of them shall be produced from

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[14] Gray, RULE AGAINST PERPETUITIES (4th ed., 1942) sec. 279.

[15] 102 F. (2d) 732 (C.C.A. Okla., 1939).

[16] Miller v. Weston, 67 Colo. 534, 189 Pac. 610 (1920) where the court said: "the rule against perpetuities is no rule at all unless the condition required to satisfy it is absolutely certain to take place within lives in being plus twenty-one years."

[17] If there are no measuring lives, then the period is twenty-one years. Closset v. Burtchaell, 112 Ore. 585, 230 Pac. 554 (1924).

[18] Lloyd's Estate v. Mullen Tractor & Equipment Co., 192 Miss. 62, 4 So. (2d) 282 (1941).

said lands by the lessee in paying quantities." The lessee had the option to postpone development indefinitely by payment of annual rental and exercised such option for several years. Cancellation was denied on appeal. The court relied on the general propositions mentioned above that at all times there were persons in being who could join to convey the fee, hence no restraint upon alienation could exist, and that the rule against perpetuities was not violated since "whatever interest was acquired by the lessee * * * by virtue of the lease in question was conveyed to him to take effect *in praesenti.*" However, the fact that this case arose so recently suggests the possibility that such leases may still be open to attack in other jurisdictions.

The present use of pooling agreements in connection with scientific development programs gives rise to another possible application of the rule against perpetuities. Present-day oil and gas leases frequently contain a clause which gives to the lessee power to pool "at any time" for development purposes all or any part of the leased land with adjacent lands owned by third persons. Such leases further stipulate that payment of royalties on production from the pooled area will be made to the respective owners in proportion to acreage ownership and that production from any part of the pooled acreage will satisfy rental, drilling and *habendum* clause obligations of all leases within the pooled area. Such clauses may be attacked under the rule since they give to the lessee a virtually unlimited power to create new property interests in third persons in the land so leased at any time in the future. In the only case found in which this issue has been litigated the result was far from conclusive. The Supreme Court of Oklahoma upheld such a clause in *Imes et al. v. Globe Oil & Refining Co. et al.*[19] by construing the phrase "at any time" to mean a reasonable time on the assumption that such was the obvious intention of the parties. Therefore, the lessee's interest was not too remote. As pointed out above by reference to *Miller v. Weston,*[20] this type of reasoning is unsatisfactory since the rule against perpetuities is not one of construction, but, on the contrary, is a strict rule of law to be strictly applied. It is suggested that the holding in this case should be questioned and that the practical answer is to limit the time during which the leased land may be pooled to a period of less than twenty-one years. This would eliminate questions regarding the possible remoteness of such pooling clauses. It should be noted that a similar problem may arise in connection with clauses permitting the lessee to unitize the land.

In conclusion, it may be stated that the rule should be carefully considered in drafting leases which have the effect and purpose of postponing development for an indefinite period or of giving the lessee power to place the land in a pool or unit at any time in the indefinite future. Although many questions appear to be settled, the applicability of the rule to oil and gas interests has not been raised in a number of important oil producing states, and the possibility of vexatious litigation still remains.

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[19] 184 Okla. 79, 84 P. (2d) 1106 (1938).

[20] Note 16, *supra.*

Federal Controls of Uranium-Bearing Ores

By CHRISTOPHER J. ALLISON*

Since the explosion of the atomic bomb over Hiroshima in 1945, the importance to a nation of a supply of uranium has received more discussion than the importance of a supply of gold and silver.[1] Because ores bearing uranium are basic raw materials in the production of atomic energy, they are subject to certain federal controls stemming from the provisions of the Atomic Energy Act of 1946.[2] These controls are superimposed upon prior existing federal statutes, regulations of the Department of Interior, and state mining law. General information on the extent of these controls should be of particular interest to attorneys practicing in this state.

A permit from the federal government is not needed in order to prospect for uranium on federal lands except in certain localities as Indian reservations. Arrangements for the lease or purchase of uranium mining rights in privately owned lands may be made as in the case of any other land.

At the present time the Atomic Energy Commission is carrying on extensive uranium surveys on the Colorado Plateau. The public land in this area of approximately 150 square miles in southwestern Colorado and southeastern Utah, has been withdrawn from mineral entry and appropriation.[3] Where ore is found on privately-held claims in this withdrawn area, work by the Commission will stop when it is thought that indications justify the owner continuing exploration and development at his own expense.[4] On completion of exploration in a given area, those lands withdrawn from mineral entry will be released from the withdrawal orders and will again be open for entry. It is expected that such lands found to contain uranium will become

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[1] Over 100 minerals bear uranium, but only two are responsible for the greater part of the world's present supply—pitchblend and carnotite. DE MENT, J., AND DAKE, H. C., HANDBOOK OF URANIUM MINERALS, p. 46, Mineralogist Printing Co. (1948). Pitchblend, the only primary mineral-bearing uranium, is by far the most important, but this ore has not been discovered in major concentrations in the United States.

Carnotite is found in a number of localities in the world, and the deposits in the Colorado Plateau area are the best known source in the United States. Discovered in 1899, they have been the principal domestic source of vanadium, radium, and uranium. Only high grade ore was taken for radium extraction in the early period of production, but since 1937 the Colorado Plateau deposits of carnotite have been mined intensively for vanadium. Fisher, FEDERAL EXPLORATION FOR CARNOTITE, address delivered at the annual meeting of the Colorado Mining Association, Denver, Colorado, February 1, 1949. Only in the last few years has uranium been recognized as something other than an almost useless by-product of carnotite.

Geologically, carnotite is a secondary mineral, having been formed from primary minerals by weathering or natural processes. In the Colorado Plateau area carnotite occurs in placers. It is widely scattered in the sandstones where it occurs in rich, powdery masses filling intertices between grains of sandstones and in cracks and crevices.

[2] Public Law 585, 79th Congress.

[3] Public Land Orders 459, 494, 595.

[4] Fisher, R. P., *supra*, note 1.

available for development by private interest under arrangements with the Commission.[5]

Although the Atomic Energy Act provides that all uranium and thorium on those public lands which were vacant and unoccupied on August 1, 1946, is reserved "for the use of the United States", it is the view of the Commission and the Department of Interior that this provision does not prevent the staking of a valid claim as a result of the discovery of uranium or thorium, and will generally not prevent the locator from mining or selling the ore.[6]

The Bureau of Land Management of the Department of Interior has set forth the standard procedure for staking claims on the public domain, and this procedure is applicable to uranium ores. Generally a location is made by staking the corners of the claim, posting notice of the location thereon, and complying with the state laws regarding the recordation of location in the county recorder's office. All state mining laws supplemental to United States mining laws must be observed. A patent is not necessary in order to develop, mine and dispose of uranium, but possessory right must be maintained by the performance of annual assessment work on the claim in order to prevent its relocation by another.[7]

Powers of The Commission

Because the Atomic Energy Act provides that the Federal government retains rights in uranium ores located on all public lands after August 1, 1946, the Atomic Energy Commission has the right to enter public lands which are subject to location and remove the uranium or thorium. It may also require the delivery to the Commission of uranium or thorium located on public lands after the metal has been mined and separated. If the Commission exercises either of these powers, it does not have to pay for the uranium removed, but compensation is allowed for any damages caused by the Commission's action and for any by-product, such as vanadium, which is removed with the uranium. In the latter case it must pay for the reasonable value of one's services and labor, including a profit.

Although the right of entry or the power to require delivery exists, the Commission has followed the policy of acquiring uranium ores through commercial means. Guaranteed minimum prices have been established, and ores meeting the specifications (0.10 percent U_3O_8) will be purchased by the Commission or its authorized agent. Delivered ores assaying less than 0.10 percent become the property of the Commission or its agent as liquidated damages for the buyer's expense of assaying.[8]

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[5] Prospecting for Uranium, United States Atomic Energy Commission and the United States Geological Survey (1949).

[6] Prospecting for Uranium, *supra,* note 5.

[7] Circular No. 1278, United States Department of the Interior, Bureau of Land Management.

[8] Circulars 1, 3, and 5, Domestic Price Schedules, United States Atomic Energy Commission.

The Atomic Energy Act provides that no person may transfer or deliver, receive possession of, or title to, source material (uranium or thorium) after removal from its place of deposit in nature without a license from the Commission.[9] Source material in order to be subject to licensing must contain by weight 0.05 percent or more of uranium or thorium or any combination thereof.

The $10,000.00 bonus being offered by the Federal government was made "to stimulate prospecting for, discovery of, and production from new high grade domestic uranium deposits". This bonus will not be paid merely for the discovery alone, but only in connection with delivery to the Commission of the first 20 short tons of uranium bearing ores or mechanical concentrates assaying 20 percent or more uranium by weight from any single mining location, lode, or placer which has not been previously worked for uranium. Further, this bonus does not apply to delivery of ores of the Colorado Plateau area for which the Commission has established guaranteed minimum prices.[10]

To date the Colorado Mining Association has not received information of any prospectors or miners receiving this bonus.

New Members of The Denver Bar Association

At the first two meetings of the new association year, the following fifty attorneys were admitted to membership in the Denver Bar Association:

E. A. Howard Baker, Jr., Ernest S. Baker, Virginia E. Baker, Bernard L. Beck, Silvio H. Bottone, Louis W. Burford, George L. Creamer, Dorothy M. Davis, James J. Delaney, Joseph F. Dolan, Howard E. Erickson, Frederick M. Farrar, Wesley W. Forsyth, Bert A. Gallegos, Thomas A. Gilliam, Milton G. Janecek, William D. Johnson, Philip C. Klingsmith, Jr., C. J. Lewis, Lila I. Ludlam, Andrew M. Lungren, James N. Matteson, Thomas E. McCarthy, George M. McNamara, Robert D. Means, Charles B. Messenger, Arch L. Metzner, Jr., Anne L. Miller, Robert S. Mitchell, Robert B. Moch, James D. Parriott, Jr., Bruce Ownbey, John E. Radloff, H. Joe Rawlinson, Jr., Warren E. Roberts, Melvin Rossman, Ralph Sargent, Jr., Roy S. Scott, Jr., Edwin M. Sears, Norman B. Smith, Walter A. Steele, Robert Sunshine, George K. Voseipka, Lindsay P. Walden, Westel B. Wallace, James L. Webb, Ford E. Weyandt, Winston W. Wolvington, Jane C. Woodhouse, and William R. Young.

Southern Colorado Bar Association

Officers of the Southern Colorado Bar Association during the current year are: Joseph F. Nigro of Trinidad, president; William B. Nicholas of Walsenburg, vice-president; and Gilbert Sanders of Trinidad, secretary-treasurer.

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[9] Licensing Regulations 40.2, United States Atomic Energy Commission.

[10] Circular No. 2, Domestic Price Schedule, United States Atomic Energy Com.

Denver Justice Courts Reorganize

Significant changes affecting the Justice and Municipal Courts of the City and County of Denver are scheduled to take place commencing January 1, 1950. All justice court criminal cases, which include misdemeanors and preliminary hearings, and which were heretofore filed in the justice courts located in the City and County Building, will be filed in the justice court located in the Police Building, 13th and Champa Streets.

This transfer of criminal cases will free the justice courts in the City and County Building so that full time may be devoted to the hearing of civil matters. This part of the change is aimed at remedying an existing condition which prevented expeditious hearings because of the heavy work load.

At the same time, the traffic division of the municipal and justice courts will be transferred from the Police Building to the City and County Building. This court will be located in the southwest corner of the main floor. The Traffic Violations Bureau, which handles the automatic pleas of guilty on minor, non-hazardous traffic violations, will be transferred from the Police Building to the City and County Building near the new traffic division.

The clerks' offices of both justice courts now located in the City and County Building, together with the clerks' office of the traffic division, will be consolidated in a clerks' office to be located adjacent to the new traffic division.

These changes are aimed at equalizing the work load in the various justice and municipal courts to the end that greater service may be rendered the public and members of the bar. The assignment of judges as announced in the change is as follows:

Civil-Division No. 1—Judge Robert H. McWilliams, Jr.
Civil-Division No. 2—Judge David W. Oyler.
Traffic-Division No. 3—Judge David Brofman.
Police and Criminal Division No. 4—Judge Frank E. Hickey.

Third International Conference of The Legal Profession

Members of the legal profession throughout the world are invited to attend the Third International Conference of the Legal Profession, which will be held in London, under the auspices of the International Bar Association (of which the American Bar Association is a member) from July 19 to July 26, 1950.

Those who desire to attend should communicate immediately with Amos J. Peaslee, Secretary-General of the International Bar Association, 501 Fifth Avenue, New York 17, N. Y. Forms of enrollment, and of notice of intention to submit papers on topics to be considered at the conference will be sent upon request. Additional preliminary information is available in the secretary's office, 319 Chamber of Commerce Bldg., Denver.

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Six Honorary Life Members Named

At the regular monthly meeting of the Denver Bar Association on November 7, at which Dr. Bradford Murphy was the featured speaker, honorary life membership certificates were presented to the following attorneys with 50 or more years of service at the bar: L. Ward Bannister, Edwin I. Grenfell, William V. Hodges, Gerald Hughes, Frank McLaughlin, and Charles J. Munz.

Blue Cross Enrollment Possible Now

The Colorado Hospital Service has informed the secretary's office that until December 15, 1949, new enrollments will be accepted for the Denver Bar Association's Blue Cross group without regard for the regular anniversary enrollment date, which is August 1.

Any members of the Denver Bar Association who do not now carry Blue Cross hospitalization, but desire to do so, should get an application from the secretary's office immediately. Blue Shield benefits are not available through the bar association group.